

Ryan v Town of Riverhead

2013 NY Slip Op 30038(U)

January 3, 2013

Supreme Court, Suffolk County

Docket Number: 06837/2006

Judge: William B. Rebolini

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Anne L. Ryan, as Administratrix of the Estate of William Anthony Stone and Anne L. Ryan, individually, Glen Meyer, as Executor of the Estate of Joseph Wowak, June T. Behr, Administratrix of the Estate of Heidi J. Behr, deceased, and June T. Behr, individually,

Plaintiffs,

-against-

Town of Riverhead, Eric Maas, John White, Wine Services, Inc. and Riverhead Volunteer Ambulance Corp., Inc.

Defendants.

Index No.: 06837/2006

Attorneys [See Rider Annexed]

Motion Sequence No.: 017; MOT.D

Motion Date: 8/24/12

Submitted: 10/10/12

Motion Sequence No.: 018; MD

Motion Date: 8/24/12

Submitted: 10/10/12

Motion Sequence No.: 019; XMD

Motion Date: 8/30/12

Submitted: 10/10/12

Motion Sequence No.: 020; MG

Motion Date: 9/26/12

Submitted: 10/10/12

Upon the following papers numbered 1 to 91 read upon this motion and cross motion for summary judgment; and motion to amend pleadings: Notice of Motion and supporting papers (017), 1 - 6; Notice of Motion and supporting papers (018), 7 - 17; Notice of Cross Motion and supporting papers (019), 18 - 40; Notice of motion and supporting papers (020), 41 - 62; Answering Affidavits and supporting papers, 63 - 78; Replying Affidavits and supporting papers, 79 - 91; it is

ORDERED that the motion (#017) by defendants Town of Riverhead and Eric Maas for summary judgment, the motion (#018) by defendant Riverhead Volunteer Ambulance Corp., Inc. for dismissal of the complaint, the motion (#020) by plaintiff Glen Meyer, as Executor of the Estate of decedent Wowak (Meyer), to amend the complaint and the bill of particulars, are consolidated for

lh

Ryan, et al. v. Town of Riverhead, et al.

Index No.: 06837/2006

Page 2

the purposes of this determination and are decided together with the cross motion (#019) by plaintiff Meyer for leave to amend the complaint and the bill of particulars; and, it is further

ORDERED that the motion (# 017) by defendants Town of Riverhead and Eric Maas for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is granted as to defendant Eric Maas only and is otherwise denied; and, it is further

ORDERED that the motion (#018) by defendant Riverhead Volunteer Ambulance Corp., Inc. for an order dismissing the complaint pursuant to CPLR 3211(a)(5) and (7) and for summary judgment in its favor is denied; and, it is further

ORDERED that the cross motion (# 019) by plaintiff Meyer for an order pursuant to CPLR 3025(b) for leave to amend the complaint and the bill of particulars is denied as moot, it having been served with an improper return date and having been superseded by motion designated as motion sequence # 020; and, it is further

ORDERED that the motion (# 020) by Meyer for an order pursuant to CPLR 3025(b) for leave to amend the complaint and the bill of particulars is granted.

This consolidated action stems from an automobile accident which occurred on Route 25 in the Town of Riverhead, New York, on May 3, 2005. At the time of the accident, decedent Joseph R. Wowak was a patient being transported in an ambulance owned by defendant Town of Riverhead and operated by defendant Eric Maas, who was a member of defendant Riverhead Volunteer Ambulance Corp., Inc. ("Volunteer Ambulance"). Decedents William Stone and Heidi Behr, who were emergency medical technicians and were also members of Volunteer Ambulance, were present in the ambulance and died as a result of the accident. Subsequently, decedent Wowak died of causes unrelated to the accident and, prior to his death, he commenced this action for injuries he allegedly sustained as a result of the accident.

Each of the motions presently pending before the Court was denied without prejudice to renew upon proper papers by order dated July 5, 2012. Subsequently, and in a timely manner, each of the moving parties has resubmitted its motion. Thus, defendants Town of Riverhead and Eric Maas now move for summary judgment dismissing the complaint and all cross claims against them; defendant Volunteer Ambulance moves for an order pursuant to CPLR 3211 dismissing the complaint against it and for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint; and, plaintiff Meyer cross-moves for an order granting leave to amend the complaint and the bill of particulars to include the claim that defendants acted with reckless disregard for the safety of others.

In support of their motion for summary judgment, defendants Town of Riverhead and Eric Maas submit, *inter alia*, copies of the pleadings, the finding sheet from the New York State Department of Motor Vehicles dated June 19, 2008, workers' compensation benefits claim forms, transcripts of examinations before trial of defendant Maas and Volunteer Ambulance by Ronald

Rowe, minutes of the Department of Motor Vehicles hearing held on June 18, 2008, Joseph R. Wowak's notice of claim dated July 12, 2005, this Court's order of July 5, 2012, and plaintiffs' bills of particulars. Defendants argue that the complaints and cross-claims must be dismissed against them because defendant Maas was faced with an emergency situation when a truck unexpectedly executed a left turn in front of the ambulance he was operating, notwithstanding that the ambulance had its lights and sirens activated. It is also argued that based on the finding of an administrative hearing officer for the NYS Department of Motor Vehicles that defendant Maas did not violate VTL § 1104 and was not negligent in the operation of the ambulance, plaintiffs cannot prove that he acted with reckless disregard for the safety of others (and are collaterally estopped from doing so), as is required for civil liability to attach in the operation of an emergency vehicle in an emergency situation. In addition, it is asserted that the receipt of benefits by the plaintiffs Estate of Heidi T. Behr and Estate of William Anthony Stone pursuant to the Volunteer Ambulance Workers' Benefit Law ("VAWBL") and the Workers' Compensation Law preclude them from suing defendant Eric Maas, a fellow servant, and defendant the Town of Riverhead in accordance with VAWBL § 19.

In its motion for summary judgment or for an order dismissing the complaints of Anne L. Ryan, as Administrator of the Estate of William Anthony Stone, and Anne L. Ryan individually, and June T. Behr, Administratrix of the Estate of Heidi J. Behr, deceased, and June T. Behr individually, pursuant to CPLR 3211 (a) (5) and (7), defendant Volunteer Ambulance adopts the arguments made by co-defendants the Town of Riverhead and Eric Maas and, as to plaintiff Glen Meyer, as Executor of the Estate of Joseph Wowak, they argue that plaintiff failed to plead in the complaint or bill of particulars that defendant Eric Maas acted with reckless disregard for the safety of others as is set forth and required by VTL § 1104, thus failing to state a cause of action.

Plaintiff Meyer, as Executor of the Estate of Joseph Wowak, moves to amend his pleadings and his bill of particulars to include allegations that defendants acted recklessly in the operation of the ambulance and in the hiring, training, and supervision of its personnel. Plaintiff includes copies of the proposed amended complaint and bill of particulars with the motion.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Ryan, et al. v. Town of Riverhead, et al.

Index No.: 06837/2006

Page 4

The emergency doctrine recognizes that when a driver is confronted with an emergency situation which leaves little or no time for thought, deliberation or consideration, he or she may not be negligent if the actions taken were reasonable and prudent in the emergency context (*Jacobellis v New York State Thruway Auth.*, 51 AD3d 976 [2d Dept 2008]). However, the emergency doctrine applies only to circumstances where a party is confronted by a sudden and unforeseen occurrence not of his own making (see *Cascio v Metz*, 305 AD2d 354, 759 NYS2d 502 [2d Dept 2003]; *Muye v Liben*, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]).

Defendant Maas testified at his examination before trial that he was the driver of an ambulance which was involved in a collision on May 3, 2005 and that the rules and regulations and by-laws of the Volunteer Ambulance, as they related to driving an ambulance, require that the it be driven "at the posted speed limit, unless it's an extreme emergency" in which case Mr. Maas believes that the rules and regulations and by-laws permit the ambulance to be driven "10 to 15 miles per hour over the posted speed limits." He indicated that the emergency medical technician in charge of the patient makes the determination as to whether an "extreme emergency" exists, and that on May 3, 2005, plaintiff's decedent, William Anthony Stone, was in charge and told him to "go faster to get [to the hospital]" and "to expedite to the hospital", which meant that it was an extreme emergency. As a result of those instructions, Mr. Maas stated that he accelerated to 50 miles per hour (the speed limit being 45 miles per hour in that vicinity), although he admitted that he spoke to a police officer after the accident and indicated that he "was going 60 miles per hour or less." During the 4 ½ miles prior to the accident while driving westbound on Route 25, an east-west roadway with one lane in each direction separated by double yellow lines, defendant Maas stated that he passed approximately 10 to 15 vehicles and that he took the ambulance into the eastbound lane of traffic 4 or 5 times.

In his testimony defendant Maas maintained that there was a hill on Route 25 which prevented him from seeing west of the hill until he was on the crest of the hill, but that he observed no vehicle in front of him for 200 feet prior to reaching the hill. However, when he reached the crest of the hill, he could see a red dump truck which he claims "was pulling to the right of the, into the shoulder with the brake lights on" and that as he took his foot off the gas and started to decelerate by "put[ting] his foot over the brake, without pressing down," he headed to the left to cross over the double yellow line to give the truck room so he could pass it. He crossed over the lines into the eastbound traffic lanes by 2 to 3 feet, then observed "the dump truck make a sharp left turn in front of me...it was heading to the right, and then it curved and - - - 90 degrees right in front of me." Defendant Maas maneuvered the ambulance to the right and did not come into contact with the dump truck. The right rear tire of the ambulance struck the curb, however, and then collided with a tree on the northern side of the westbound lane of traffic. (The testimony of Mr. Maas during the NYS Department of Motor Vehicle hearing was essentially the same.)

In opposition to the motion, plaintiff June T. Behr, as Administratrix of the Estate of Heidi J. Behr, deceased, and June T. Behr, individually ("Behr"), submits, *inter alia*, pertinent portions of the deposition transcript of defendant John White and the County of Suffolk Division of Medical-Legal Investigations & Forensic Sciences Crime Laboratory Reconstruction Report dated August 9, 2005 ("the reconstruction report"). Defendant White, whose testimony was not part of the NYS Department of Motor Vehicle hearing, stated during his deposition that on May 3, 2005, he did not

stop the dump truck he was driving, that he slowed down and stayed in a perfectly straight line, that he absolutely did not move farther to the right, and that he activated his left turn signal 500 feet prior to making a left turn into his driveway off of Route 25. Debra C. Nelson, the analyst who signed the reconstruction report found that “[t]he calculated speed range of the ambulance at the beginning of the tire marks [was] 73 to 79 miles per hour.” The report indicated that at the time of the accident the roadway conditions were dry, day-lit, and governed by a posted area speed limit of 40 miles per hour.

Based upon the conflicting versions offered by defendants in connection with the movement of the dump truck, and upon the testimony of defendant Maas with regard to the speed of the ambulance immediately prior to the collision, as juxtaposed to the finding regarding speed as set forth in the reconstruction report, it is clear that questions of fact exist as to whether the emergency situation faced by defendant Maas was of his own making. The moving defendants, the Town of Riverhead and Eric Maas, have failed to meet their burden of demonstrating that there are no material issues of fact in connection with the applicability of the emergency doctrine (*see Cascio v Metz, supra; Muye v Liben, supra*) and, accordingly, summary judgment is denied on the applicability of the emergency doctrine.

Although municipalities may be shielded from simple negligence and mere errors in judgment, the Courts of this State have held that liability may be imposed upon a municipality within the state of New York when a police officer drives his police vehicle during an emergency situation with reckless disregard for the safety of others (*see Campbell v City of Elmira*, 84 NY2d 505, 620 NYS2d 302 [1994]; *see also Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297 [1994]; *Krulik v County of Suffolk*, 62 AD3d 669, 878 NYS2d 436 [2d Dept 2009]). Pursuant to Vehicle & Traffic Law §1104 (b)(3), “[t]he driver of an authorized emergency vehicle may: [e]xceed the maximum speed limits so long as he does not endanger life or property.” Under section 1104 (e), such provision “. . . shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.” The Court of Appeals has determined that the standard by which this statute must be interpreted is governed by the question of recklessness, such that civil liability may be imposed for an officer’s actions in pursuing a suspected lawbreaker upon a showing that he acted in reckless disregard for the safety of others (*see Saarinen v Kerr, supra*). This standard, *i.e.* reckless disregard, requires proof that the officer pursuing a suspect, for example, intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow (*see Campbell v City of Elmira, supra; see also Saarinen v Kerr, supra; Ferrara v Village of Chester*, 57 AD3d 719, 869 NYS2d 600 [2d Dept 2008]).

The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v New York Tel. Co.*, 62 NY2d 494, 501-502, 478 NYS2d 823 [1984]; *Breslin Realty Dev. Corp. v Shaw*, 72 AD3d 258, 263, 893 NYS2d 95 [2d Dept 2010]). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was “material” (*emphasis supplied*) to a prior judicial or quasi-judicial determination, the party to be estopped bears

the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see Ryan v New York Tel. Co., supra*).

Here, it is clear that the prior proceeding at the Department of Motor Vehicles dealt with the same issue that the Court is faced with in connection with defendant Maas' possible violation of VTL §1104. The hearing officer discounted defendant White's testimony in its entirety and accepted as true defendant Maas's testimony in its entirety, and in so doing, he exonerated Maas of wrongdoing and suspended White's driving license for a period of six months. However, plaintiff Behr has come forward and shown that plaintiffs did not have a full and fair opportunity to litigate the issue in that proceeding (*see Ryan v New York Tel. Co, id.*; *see also Breslin Realty Dev. Corp. v Shaw, id.*). Plaintiffs have shown that there is a question as to whether the hearing examiner considered various witness statements which do not necessarily corroborate defendant Maas's version of the happening of the accident, nor did he consider the fact that defendant White stated that he was not aware that an ambulance was behind him. The parties should not be precluded from litigating the issue of whether defendant Maas was in violation of VTL § 1104, *i.e.*, whether he acted with reckless disregard for the safety of others in the manner in which he operated the ambulance. Accordingly, summary judgment dismissing the complaint and cross claims against defendants the Town of Riverhead and Maas based upon collateral estoppel is denied.

The Volunteer Ambulance Workers' Benefit Law § 19 states:

The benefits provided by this chapter shall be the exclusive remedy of a volunteer ambulance worker, or his spouse, parents, dependents, next of kin, executor or administrator, or anyone otherwise entitled to recover damages, at common law or otherwise, for or on account of an injury to a volunteer ambulance worker in line of duty or death resulting from an injury to a volunteer ambulance worker in line of duty, as against (1) the political subdivision or volunteer ambulance company liable for the payment of such benefits, (2) the political subdivision regularly served by the ambulance company of which the volunteer ambulance worker is a member, whether or not pursuant to a contract for ambulance services, even though any such political subdivision is not liable for the payment of such benefits in the circumstances, and (3) any person or company acting under governmental or statutory authority in furtherance of the duties or activities in relation to which any such injury resulted; provided, however, that the benefits provided by this chapter shall not be the exclusive remedy as against persons who, in the furtherance of the same duties or activities, are not similarly barred from recourse against the volunteer worker, or his executor or administrator.

Defendants Town of Riverhead and Eric Maas claim that since plaintiffs' decedents William Anthony Stone and Heidi J. Behr and defendant Maas were employed and volunteered for the defendant Volunteer Ambulance and received workers' compensation benefits as a result of the

Ryan, et al. v. Town of Riverhead, et al.

Index No.: 06837/2006


Page 7

ambulance accident, they are barred by the Volunteer Ambulance Workers' Benefit Law and the Workers' Compensation Law from bringing the within lawsuit against them. Defendants allege that the ambulance company provided benefits to the Town of Riverhead and, thus, that the above referenced section of the Volunteer Ambulance Workers' Benefit Law precludes a lawsuit against the Town and fellow volunteer defendant Maas. However, the deposition testimony of Ronald Rowe for the Volunteer Ambulance and of Philip Cardinale, supervisor for the Town of Riverhead, indicates that the Volunteer Ambulance contracted with the "ambulance district," a separate and distinct entity from the Town of Riverhead (with its own taxing authority), and not with the Town of Riverhead. Thus, the political subdivision to which §19 of the Volunteer Ambulance Workers' Benefit Law applies is the ambulance district and not the Town of Riverhead. The Town of Riverhead is the owner of the ambulance which was involved in the accident, thus its liability is predicated upon its ownership of the vehicle and not upon a position of an employer. Accordingly, summary judgment dismissing the complaint and cross-claims of plaintiffs' decedents William Anthony Stone and Heidi J. Behr against the defendant Town of Riverhead is denied and is granted as to the portion of their claims which are interposed against defendant Maas.

The court, in its discretion, may permit amendments of pleadings pursuant to CPLR 3025 (b), and, lateness, in and of itself without a showing of significant prejudice, is not a barrier to an amendment (*see Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 471 NYS2d 55 [1983]; *Giuffre v DiLeo*, 90 AD3d 602, 934 NYS2d 449 [2d Dept 2011]; *U.S. Bank, Nat. Assn v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]). The amendment now sought by plaintiff Glen Meyer, as Executor of the Estate of Joseph Wowak, to add the additional allegations of recklessness in the operation of the ambulance and in the hiring, training, and supervision of its employees cannot come as a surprise to any of the parties. Not only did now-deceased plaintiff Wowak include an allegation that the "[c]laim [was] for personal injuries as a result of the wrongful, unlawful, grossly negligent, negligent and careless acts and omissions of the Town of Riverhead and the Riverhead Volunteer Ambulance Corp." in his July 12, 2005 Notice of Claim, the defendants Town of Riverhead and Eric Maas previously moved to include an affirmative defense relative to VTL § 1104 and reckless negligence. Thus, there can be no question that defendants were aware of the claims, have not been surprised, and will not be unduly prejudiced by an amendment to the pleadings. The amendments contain no surprising or new allegations. Accordingly, the motion of Meyer, as Executor of the Estate of Joseph Wowak, which seeks to amend the complaint and bill of particulars is granted, and the proposed amended complaint and bill of particulars have been served.

The Court having granted the motion of plaintiff Meyer, as Executor of the Estate of Joseph Wowak, to amend his complaint and bill of particulars as set forth herein, the motion of defendant Volunteer Ambulance to dismiss the complaint against it on the ground that it fails to allege reckless conduct is denied as moot.

Dated: 1/3/2013


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDERAttorney for Plaintiff Anne L. Ryan:

Davis & Ferber, LLP
1345 Motor Parkway
Islandia, NY 11749

Attorney for Plaintiff Glen Meyer:

Johannesen & Johannesen, PLLC
544 Business Route 25A
Rocky Point, NY 11778

Attorney for Plaintiff June T. Behr:

Thomas G. Nolan, Esq.
Union Square, P.O. Box 826
Aquebogue, NY 11931

Attorney for Defendants
Town of Riverhead and Eric Maas:

Devitt Spellman Barrett, LLP
50 Route 111
Smithtown, NY 11787

Attorney for Defendants
John White and Wine Services, Inc.:

Torino & Bernstein, P.C.
200 Old Country Road, Suite 220
Mineola, NY 11501

Attorney for Defendant
Riverhead Volunteer Ambulance Corp.:

Furey, Furey, Leverage, Manzione,
Williams and Darlington, P.C.
600 Front Street
Hempstead, NY 11550

Clerk of the Court